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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 418

L. METCALFE WALLING, Administrator of the Wage & Hour Division, United States Department of Labor, *Petitioner*

vs.

V. GOLDBLATT BROTHERS, INCORPORATED, a corporation.

PETITION FOR LEAVE TO FILE MEMORANDUM AND MEMORANDUM, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION IN CONNECTION WITH A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a memorandum as amicus curiae in connection with the petition for a writ of certiorari in the above-entitled suit. Counsel for both parties have assented in writing, as indicated by letters filed with the clerk of this court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include thirteen national and twenty-eight state retail associations. A list of these members is attached hereto as appendix "A". Issues involved in the present litigation are of direct and vital interest to the federation and its members as well as to many other retailers.

Respectfully submitted,
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October 16, 1942

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 418

L. METCALFE WALLING, Administrator of the Wage & Hour Division, United States Department of Labor, *Petitioner*

vs.

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MEMORANDUM OF AMICUS CURIAE IN CONNECTION WITH A PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court (R. 527-535) is reported in 39 F. Supp. 701. The opinion of the Circuit Court of Appeals (R. 552-559) is reported in 128 F. (2nd) 778.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1942 (R. 560). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

(1) Whether the individuals employed in three Illinois warehouses owned by the respondent, from which merchandise purchased outside the state is distributed to the respondent's stores and customers, are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

(2) Whether certain of the individuals employed in the warehouses who prepare record books, memoranda and advertising for use in, and for the benefit of, the respondent's stores, are "engaged in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in appendix "B" infra, p. 12.

STATEMENT

Goldblatt Brothers, Incorporated, is a retail business enterprise operating ten fully stocked department stores and three warehouses which serve as necessary adjuncts to the ten stores. With the exception of three department stores in Indiana, the business is located in Chicago, Illinois. Merchandise from other states is received at the three warehouses and distributed from there either to the stores or directly to the purchaser.[2] The work

[1]These questions are present on the record at this stage, but the real question in the case is not yet entirely disclosed on the record. It is whether, under all the circumstances, the Fair Labor Standards Act is to be applied to the individuals employed in the warehouse. Inherent in that question and in addition to the problems of whether the employees are engaged "in commerce" or in "the production of goods for commerce", are the problems of whether the employees are engaged in an exempt capacity or work in an exempt establishment. These problems are integrated. They are all essential parts of the real question in this case. That question should be considered comprehensively.

[2]The statement in the Petition for Certiorari appearing in footnote 4 on page 9 to the effect that all merchandise in the warehouses is held for delivery to the stores appears to be an error. (See: R. 132-133, 392, 413-414, 425-427, 429, 431, 542.)

of most employees in the warehouses is concerned with receipt, storage and distribution of the merchandise although the advertising program for the stores is worked out and executed by employees some of whom work at the warehouses. Paper forms in the nature of order blanks, and warehouse records as well as delivery schedules are made up and printed in one of the warehouses. The entire Goldblatt operation is considered one enterprise (R. 242).

The Administrator of the Wage & Hour Division of the Department of Labor asserts (R. 2-7) that the individuals working in the three warehouses are "engaged in commerce" or "in the production of goods for commerce" and therefore subject to the terms of the Fair Labor Standards Act. At the trial the District Court, on its own motion, dismissed the complaint when the Government rested (R. 544-545). The Circuit Court of Appeals found error in the holding of the District Court that none of the employees could be found to be engaged in commerce or in the production of goods for commerce and, after reversing the judgment in part, remanded the case in order that further evidence could be heard as to the duties of each employee and as to the defenses raised by the respondent.

ARGUMENT

I.

The retail industry in this country is large.[3] It operates in every community. Very frequently warehouses function as an integral part of a retail enterprise. The status under the Fair Labor Standards Act of em-

[3]In 1939 there were 1,770,355 stores and the total number of employees, including active proprietors of unincorporated businesses engaged in retail enterprises, was 6,213,890. (Statistical Abstract of the U. S.—1941. Published in 1942 by U. S. Department of Commerce, Bureau of the Census, Table 910, page 926.) Total retail store sales for the year 1941 were $53,613,000,000. ("Domestic Commerce" issued by U. S. Department of Commerce Vol. 29, No. 7, p. 13.)

ployees working in such a warehouse is an important question and the retail industry is interested in an authoritative determination of it. However, we feel that this case does not now present an adequate record on which to consider that status of such employees, and that the record does not fairly describe a retail enterprise in which a warehouse functions as an integral part.

The ultimate question in this case is whether the respondent is subject to Sections 6 and 7 of the Fair Labor Standards Act in respect of any or all of the employees who are employed at its warehouses. The District Court held that none of the employees were engaged "in commerce" or "in the production of goods for commerce" within the meaning of those sections. The Circuit Court of Appeals was of the opinion that some of the employees were so engaged while others were not. Thus, as the case now stands, it presents only the question whether employees working in various capacities in a warehouse functioning as an integral part of a retail mercantile enterprise are engaged in commerce or in the production of goods for commerce within the meaning of Sections 6 and 7.

But that question is not determinative of the ultimate status of the employees of the respondent under the Act. Section 13(a)(1) and (2) provides that Sections 6 and 7 shall not apply to any employee "employed in a bona fide retailing capacity" or "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". The test of coverage under Sections 6 and 7 relates to the nature of the employment of the particular employee. (*Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942, 62 S. Ct. 1116, 1120.) The application of the exemption under Section 13(a)(2) on the other hand, turns on the nature of the employers business. (Interpretive Bulletin Number 6, Wage and Hour Division, 1942 Wage and Hour Manual, 326.) Nevertheless, where problems of coverage and exemption

exist in a single case, the two can not sensibly be separated.

In addition to denying that its employees are engaged in commerce or in the production of goods for commerce, the respondent has alleged in its pleadings (R. 21-23) that the employees concerned are employed in an exempt local retailing capacity and that the respondent is an exempt retail establishment of which the warehouses are an integral part[4]. On neither of these issues has the respondent yet offered its evidence. The question of the application of the statutory exemptions has not been considered[5]. Therefore, the decision of the court below is not, and a decision by this Court cannot be, dispositive of this case. By the same token, a decision by this Court on the present record would not settle the ultimate question, of general application and importance, as to the status under the Fair Labor Standards Act of an employee employed in a warehouse that functions as an integral part of a retail enterprise.

Moreover, we submit that the present record does not furnish an adequate basis for an authoritative determination of the questions presented. While the respondent operates a retail enterprise in which warehouses function as an integral part, this record does not fairly describe such an enterprise. Consisting solely of evidence offered by the petitioner, it necessarily fails to disclose all the facts which may be relevant or to supply the perspective which might be expected to result from evidence offered by the respondent to sustain its affirmative defense and to rebut, control and amplify the evidence offered by the petitioner. Thus, it does not

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[4]The District Court specifically found (R. 541) that the warehouses were "necessary adjuncts" of the respondent's business.

[5]In remanding the case to the District Court the Circuit Court of Appeals said: (R. 559; 128 F. 2nd, 778, at 784) "We do not attempt to frame a final judgment, inasmuch as the order appealed from was entered without complete hearing. Furthermore, as only the Administrator's evidence was heard, what we have said shall not prejudice in any manner the defendant's right to prove any of the statutory exemptions."

give the Court the benefit of fully developed facts upon which to base a decision. On the contrary, it fails to describe adequately either the work of the respondent's employees or the nature of the respondent's business.

This is particularly true with respect to the second of the two questions raised by the petition, namely, whether certain employees in one of the respondent's warehouses who prepare record books, forms and advertising for use in or for the benefit of the retail stores are engaged "in the production of goods for commerce". That was clearly treated as a secondary issue and the facts concerning it were only incidentally developed by the petitioner's evidence (See: R. 42, 91-93, 98, 104-105, 395-403, 437-447, 487-493). Nearly all retail enterprises employ individuals to do work of this general nature although the work may not be done in warehouses. Consequently, this question is also of importance to the retail industry. We feel that it would be unfortunate to have it considered on the basis of an inadequate record consisting only of the evidence offered by the petitioner which does not fully describe the work done by the employees concerned or the relation of that work to the respondent's entire organization.

We submit that the state of the record is such that a writ of certiorari should not now be granted. This is a proceeding where facts determine the applicability of the statute and the applicability of the statute is challenged. The "salutary principle that the essential facts should be determined before passing upon grave constitutional questions . . . ." is analagous and pertinent. See *Polk Co.* v. *Glover,* 305 U. S. 5, 10; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 211-213.

II.

Although the use of warehouses is common to both, the type of retail enterprise of which the one operated by Goldblatt Brothers, Incorporated is an example, differs substantially from the type of wholesale enterprise of which the ones operated by Carr Bros. Company[6], and Jacksonville Paper Company are typical[7]. In the latter type of enterprise, merchandise from out of the state reaches the warehouse and is then sold at wholesale for subsequent resale or for industrial consumption. In the former, when the merchandise arrives at the warehouse, it is already in the hands of the ultimate retailer. In the Higgins and in the Jacksonville Paper Company cases the respondents do not own the outlets to which the merchandise is distributed from the warehouse[8]. The contrary is true in the present case. In neither of those cases is there any question of statutory exemption. In the instant case there is. The Administrator of the Wage and Hour Division, nevertheless, seeks to apply his view[9] indiscriminately to both types of enterprise and suggests[10] that the present case will complement the presentation of the principal question in the Higgins and Jacksonville Paper Company cases.

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[6]*Higgins* v. *Carr Brothers Company*, No. 97, pending before this Court, certiorari granted June 9, 1942.

[7]*Walling* v. *Jacksonville Paper Co.*, No. 336, petition for certiorari now pending.

[8]The matter of identity of ownership between the warehouse and all the outlets may be important on the issue of whether the employees working in the warehouse are engaged "in commerce." (See: *Fleming* v. *American Stores Co.*, U.S. D.C., E.D., Pa., 42 F. Supp. 511, 524) and it may be determinative of whether the enterprise is exempt. *White* v. *Jacobs Pharmacy Co. Inc.*, decided September 28, 1942. U.S. D.C., N.D. Ga., 5 W. and H. Rep. 793.

[9]The Administrator's view is that all employees in a warehouse occupy an intermediate, not terminal, position in interstate commerce. See petition for certiorari in *Walling* v. *Jacksonville Paper Co.*, pp. 9-11.

[10]Petition for certiorari, pp. 9-11. See also: petition for certiorari in *Walling* v. *Jacksonville Paper Company*, p. 9.

We feel that the two types of enterprise are essentially different and that such similarities as exist between them militate against rather than support the petitioner's application for certiorari at this time. While a ruling in the Higgins case against the Administrator's view would prevent the subsequent application of it to a retail enterprise such as Goldblatt Brothers, a ruling in favor of the Administrator's view would not determine its application to employees working in a warehouse that functions as an integral part of a retail enterprise. This we believe to be true not only because of the specific exemptions contained in Sections 13(a)(1) and (2), but also by reason of the important differences between wholesale and retail warehouses in relation to the application of Sections 6 and 7 of the Act.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted
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October 16, 1942.

APPENDIX A

American Retail Federation

MEMBER ASSOCIATIONS

THIRTEEN NATIONAL ASSOCIATIONS

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of *Food* Chains
National Association of Retail *Grocers*
National *Automobile* Dealers Association
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute

TWENTY-EIGHT STATE ASSOCIATIONS

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Florida Merchants Association, Inc.
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa,* Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)

Maryland Council of Retail Merchants
Massachusetts Council of Retail Merchants
Michigan Retail Institute
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants
North Carolina Merchants Association
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*

APPENDIX B

Fair Labor Standards Act. c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .